TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Text

Supreme Court of the United States

October Term, 1974

No. 74-8

J. B. O'CONNER, M.D.,
Petitioner,

vs.

KENNETH DONALDSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF STATE OF OHIO AMICUS CURIAE

INTEREST OF THE AMICUS

The State of Ohio has a direct and immediate interest in the recognition of a constitutional right to treatment. Confined in 28 Ohio facilities for the mentally ill and mentally retarded are approximately 18,350 persons,[1] approximately one-half of whom were committed involuntarily. The State believes that each involuntarily committed patient has "a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition." *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *on submission on proposed standards*, 334 F. Supp. 1341, *enforced*, 344 F. Supp. 373, *appeal docket sub nom. Wyatt v. Aderholt*, No. 72-2634 (5th Cir. 1974).

1. According to research published in the *Quarterly Journal of the National Association of Mental Health*, Volume 56, No. 4, Fall 1972, this year 1 out of every 10 Americans will suffer some form of mental illness severe enough to require hospitalization.

Ohio demonstrated its firm commitment to mental health care when it admitted the existence of such a right in its Answer filed in a suit involving persons committed to a state facility for the criminally insane.[2] Any decision concerning the constitutional right to treatment will affect the citizens of Ohio and the state officials responsible for delivering mental health services to the people.

In Ohio, many deficiencies still exist in the delivery of mental health services. There is certainly a lack of a sufficient number of qualified staff. Ohio has undertaken an active recruitment program in order to attract qualified mental health professionals including psychiatrists. Presently 96 fulltime board eligible psychiatrists and 22 fulltime board certified psychiatrists service 26 institutions in Ohio. One of the major problems in recruitment of qualified staff to state service is that the salary scale is not competitive with the scale in private practice. See Appendix. Since this case involves the issue of the awarding of monetary damages against physicians who work in state institutions, this court's decision will affect Ohio's operation of mental health facilities.

Thus, the State of Ohio, acting by and through the Attorney General of the State, respectfully submits this brief as *amicus curiae* pursuant to Rule 42, of the Revised Rules of the Supreme Court of the United States, requesting an affirmance in part and reversal in part of the lower court's decision.

---

2. *Davis v. Watkins*, CA 73-205 (N.D. Ohio, 1974). This case, a class action filed against state officials, alleged, *inter alia*, a constitutional right to treatment for patients involuntarily committed for the purpose of treatment. On September 9, 1974, United States District Judge Nicholas Walinski recognized the constitutional right to treatment and defined the parameters of such a right. The order is comprehensive and will have significant ramifications for the treatment of all persons confined in Ohio mental health facilities.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 493 F.2d 507.

QUESTIONS PRESENTED

1. Whether a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition.

2. Whether a state-employed physician in the absence of an enunciated constitutional right to treatment can be held personally liable for monetary damages.

STATEMENT OF CASE

The State of Ohio adopts the summary of the facts of record as found in the opinion of the court below, 493 F.2d 507 at 510-515.

ARGUMENT

I. A PERSON INVOLUNTARILY COMMITTED TO A STATE MENTAL HOSPITAL HAS A CONSTITUTIONAL RIGHT TO RECEIVE SUCH INDIVIDUAL TREATMENT AS WILL GIVE HIM A REASONABLE OPPORTUNITY TO BE CURED OR TO IMPROVE HIS MENTAL CONDITION

This court should affirm the lower court's holding that the Constitution guarantees a person involuntarily

committed to a state hospital a right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition. There are two significant cases decided by this court which shed substantial light upon the existence of a constitutional right to treatment.

In *Robinson v. California*, 370 U.S. 660 (1962), a California statute imposing a ninety-day prison sentence on narcotics addicts was struck down as contrary to the proscriptions of the Eighth Amendment. The Court held that a person would not be punished for an illness, a condition or a "status" from which he could not voluntarily extricate himself. Finding addiction to be an illness, the Court suggested that a statute making the condition or "status" of mental illness a criminal offense punishable by imprisonment without treatment would meet the same determination of unconstitutionality. This principle applies with equal force to a person afflicted with mental illness, for to recognize the malady and fail to provide the necessary opportunity for treatment when that is the purpose of confinement "violates the very fundamentals of due process." *Wyatt v. Stickney, supra*, at 785.

In *Jackson v. Indiana*, 406 U.S. 715 (1972), this Court examined the case of a criminal defendant indefinitely committed solely on account of his incompetency to stand trial and found that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." It is just such a mandate which the State of Ohio is following in recognizing that the *quid pro quo* for "therapeutic" involuntary confinement is treatment.

The Court of Appeals for the Fifth Circuit recently decided *Wyatt v. Aderholt*, No. 72-2634 (Nov. 8, 1974)

and held that there is a constitutional right to treatment for persons committed to state mental institutions. Citing their decision in *Donaldson* the Fifth Circuit found the basis for the right in the Due Process Clause of the Fourteenth Amendment which mandated that in cases of civil commitment it is necessary for mental hospitals to provide "rehabilitative treatment or, where rehabilitation is impossible, minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary." *Donaldson v. O'Connor*, 493 F.2d 507, 522 (5th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3239 (Oct. 22, 1974).

It should be noted that the court in both *Donaldson* and *Wyatt* found that standards of care and treatment were not elusive. With the assistance of experts and the parties themselves, courts can articulate standards. Indeed the standards in the *Wyatt* case were not challenged on appeal by the state of Alabama. *Wyatt v. Aderholt*, *supra*, n. 10.

Other federal courts have evolved standards of care and constitutional safeguards for persons confined in various state institutions and are persuasive in sustaining a right to treatment for involuntarily committed persons. In *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966), the Court of Appeals for the District of Columbia upheld a right to treatment on statutory grounds but *in dicta* emphasized that the absence of treatment might raise the specter of possible constitutional violations.

Other institutions have come under similar scrutiny. With respect to training schools for juveniles, courts have applied the theory that commitment without treatment becomes punishment for "status" in violation of the Eighth Amendment. See *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), a medium security institution for juveniles, approximately one-third of whom are non-criminal of-

fenders; *Martarella v. Kelley*, 349 F. Supp. 575 (S.D. N.Y. 1972) juveniles classified as "Persons in Need of Supervision" (PINS); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Texas 1973), where the Court found a constitutional right to treatment for juveniles adjudicated delinquent and involuntarily committed. *See also Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966); *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953); and *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969), *cert. denied*, 396 U.S. 847 (1969).

Two district courts have enunciated a right to treatment for civilly committed mentally ill and mentally retarded persons. *Stachulak v. Coughlin*, 364 F. Supp. 686 (N.D. Ill. 1973), right to treatment for the mentally ill; and *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974), right to treatment for the mentally retarded.

II. THE LOWER COURT'S DECISION PERMITTING MONETARY DAMAGES SHOULD BE REVERSED

The lower court's decision awarding monetary damages because of a violation of the constitutional right to treatment should be reversed. The teachings of *Jackson v. Indiana, supra*, and a finding of a constitutional right to treatment should either reduce patient populations in state mental health facilities[3] or cause state legislators to appropriate additional monies for proper mental health care, or both. The finding of a constitutional right to treatment should act as a catalyst for state administrators and legislators in dealing with the problems of providing adequate mental health care. Upon such a finding, it should become unnecessary for courts to hold physicians personally liable for damages except under the most extreme circumstances.

---

3. See *Burton v. Reshetylo*, 38 Ohio St. 2d 35 (1974).

At the time this case was brought, no constitutional right to treatment had been enunciated by this Court. On the facts of this case, to hold that state employed physicians who are working in less then desirable conditions, are liable in monetary damages, for a failure to provide treatment pursuant to a right not yet enunciated by this Court, is "to hold public officials liable for acts that become unconstitutional *ex post facto*. . ." *Kirstein v. Rectors and Visitors of University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970). This Court recognized this principle in *Pierson v. Ray*, 386 U.S. 547, 577 (1967) when it stated that a public official cannot be charged with "predicting the future course of constitutional law." See also *Westberry v. Fisher*, 309 F. Supp. 12 (D. Me. 1970). Of course, such monetary damages cannot be awarded against the state treasury. *Edelman v. Jordon*, ... U.S. ....., 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); cf. *Monroe v. Pape*, 365 U.S. 167 (1961).[4]

However, the State of Ohio would argue that upon this Court finding a constitutional right to treatment and defining the parameters of the right, any physician who *in futuro* would intentionally and in bad faith provide inadequate or inhumane treatment to a patient in violation of the constitutional right may be held liable for monetary damages. *Pierson v. Ray, supra*; *Eslinger v. Thomas*, 476 F.2d 225 (4th Cir. 1973); *Skinner v. Spellman*, 480 F.2d 539 (4th Cir. 1973); *Westberry v. Fisher, supra; Clarke v. Cady*, 358 F. Supp. 1156 (W.D. Wis. 1973); *Collins v. Schoonfield*, 363 F. Supp. 1152 (D. Md. 1973); *Kirstein v. Rector and Visitors of University of Virginia, supra*. To hold otherwise would further affect the State of Ohio's

---

4. Our position is based upon the statute involved in this case, 42 U.S.C. §1983. The patient may have a state cause of action for damages which would not involve any theory based upon a federal constitutional right to treatment. Cf. *Smith v. Spina*, 477 F.2d 1140 (3rd Cir. 1973).

recruitment efforts of qualified physicians, an already insurmountable problem. Physicians may retreat to the private sector rather than run the risk of public employment. See affidavit of Mr. William Davis, Acting Director, Ohio Department of Mental Health and Mental Retardation attached hereto as an Appendix.

CONCLUSION

A constitutional right to treatment is compatible with this Court's earlier decision in *Jackson v. Indiana, supra.* The obligations arising from a right to treatment and *Jackson* will go a long way to cease the warehousing of patients in this country so that humane treatment and conditions may exist in mental institutions. The petitioners ought not be saddled with monetary damages because of their failure to foresee the enunciation of a constitutional right to treatment. The State of Ohio respectfully argues for an affirmance in part and reversal in part of the lower court's decision.

Respectfully submitted,

WILLIAM J. BROWN
Ohio Attorney General

ANDREW J. RUZICHO
BARBARA J. ROUSE
Ohio Assistant Attorneys General
State Office Tower
Columbus, Ohio 43215
Attorneys for the State of Ohio, Amicus Curiae

APPENDIX

Affidavit of William Davis

AFFIDAVIT

City of Columbus)
) SS
State of Ohio)

I, William Davis, being duly sworn depose and say:

I am William Davis, Acting Director of Ohio's Department of Mental Health and Mental Retardation. My department has an active recruitment program in effect in order to attract qualified mental health professionals to our state. We particularly have a problem hiring qualified psychiatrists. Presently, we employ 96 fulltime board eligible psychiatrists and 22 fulltime board certified psychiatrists. In addition, there are 16 board eligible and eight board certified psychiatrists working parttime for the state. The above figures include superintendents at each institution and administrators in our central office. These psychiatrists service 26 institutions or centers throughout the state.

Our recruitment efforts include maintaining close liaison with national, state and local professional organizations, advertising in national and state publications, utilizing present psychiatrists to assist us in recruitment of other psychiatrists, and surveying other states for purposes of comparative studies of salaries and prerequisites. I have found that salary ranges for psychiatrists in Ohio are a major factor for the difficulty in recruitment of qualified personnel. I have attached hereto a comparative wage study of six states which my office has compiled. If a

court were to hold psychiatrists personally liable for monetary damages because of a failure to provide adequate treatment due to insufficient state funding, in my opinion such a ruling would adversely affect our recruitment efforts for fulltime psychiatrists in state employment.

Further affiant sayeth not.

/s/ WILLIAM DAVIS

Subscribed and sworn to before me this 31st day of December, 1974.

/s/ MARION R. WOLFE
Notary Public

My commission expires October 30, 1977.

Comparable Wage Study

CIVIL SERVICE PAY (ANNUAL)

(1973-1974)

Ohio Civil Service Classification	Ohio ** 10 Yrs. Min. - Max.	Michigan ** 4 Yrs. Min. - Max.	Minnesota ** 5 Yrs. Min. - Max.	Pennsylania ** 6 Yrs. Min. - Max.	Indiana ** 5 Yrs. Min. - Max.	Illinois ** 5 Yrs. Min. - Max.
Physician 1	15142-20322	22028-26893	17892-23532	22357-24626	22204-28210	26160-32160
Physician 2	18013-24398	23970-29190	20928-25464	24626-27091	—— ——	—— ——
Physician 3	21632-28725	25640-31340	21768-26472	27091-29829	25688-32604	28308-34848
Physician Specialist 3[1]*	23546-28725	25640-31340	20928-25464	25564-28177	28319-36018	28308-34848
Physician Specialist 4[2]*	25459-31117	27373-33512	23000-32000	25564-28177	29650-37845	30732-37848
Physician Specialist 5[3]*	26437-32573	30317-37751	28000-38000	28177-34273	not reported	31215-43439

1* Board Eligible Staff
2* Board Certified Staff
3* Board Certified Administration
**No. of yrs. one may acquire maximum salary in any given classification.